ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 Amendment of the Commission's Rules and Policies Governing Pole Attachments	CS Docket No. 97-151

PETITION OF BELL ATLANTIC[1]
FOR CLARIFICATION OR FOR RECONSIDERATION

Bell Atlantic respectfully requests that the Commission clarify or reconsider its decision in this proceeding to make clear that cable companies are not exempt from paying the same pole attachment rates as other telecommunications carriers to the extent they provide an underlying *transmission* service for Internet access or other non-cable information services. When a cable operator provides the underlying transmission service, it is providing a telecommunications service as that term is defined in the Act, and is subject to the same pole attachment rates as other telecommunications carriers under section 224(e) of the Act. The Commission also should make it clear that, where a cable company fails to provide prior notice to a pole owner before it uses pole

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

attachments to provide telecommunications services, the cable company is liable for the telecommunications carrier pole attachment rates, plus interest, as of the date that the cable company begins offering telecommunications services.

ARGUMENT

In the 1996 Act, Congress created a two-tiered structure for rates paid by providers of cable service (and only cable service) and providers of telecommunications services, respectively. To the extent cable television systems use pole attachments "*solely* to provide cable service," the rate formula set out in section 224(d) Act applies. To the extent cable operators also provide telecommunications service, however, they are required by the Act to pay for attachments based on the formula set out in section 224(e). The cable-only rate formula generally provides lower rates than the rate formula that applies to entities providing telecommunications services. *See* Pole Attachment Order, FCC 98-20, ¶¶ 31-32 (rel. Feb. 6, 1998).

As required by the Act, the Commission's rules make it clear that cable operators who provide telecommunications services must pay the same rates as other telecommunications carriers. *See* 47 C.F.R. §§ 1.1409(e); 1.1417; 1.1418. However, the Commission decided that cable operators who provide "commingled" cable and Internet services should pay only the (typically lower) rate applicable to cable operators who provide only cable service under section 224(d). *See* Pole Attachment Order, ¶ 32. The Commission based this decision on its conclusion in the Universal Service Order, that Internet service does not qualify as the provision of a telecommunications service under

the 1996 Act. Id. at ¶¶ 33-34 (*citing* Universal Service Order, 12 FCC Rcd 8776, ¶ 789 (1997).

While this may be true for entities that solely provide an Internet *content* service, this aspect of the Commission's decision cannot be interpreted, consistent with the requirements of the Act, to mean that cable companies do not function as telecommunications carriers when they provide the transmission facilities and services that allow a subscriber to connect to the Internet. Under these circumstances, the cable companies are providing a "transmission" service that falls squarely within the definition of a "telecommunications" service under the Act, *see* 47 US.C. § 153(43), and are fulfilling the same function as, and directly compete with, the incumbent local exchange companies and competitive local exchange carriers in providing telecommunications services, *see* 47 U.S.C. § 153(46). As such, based on the plain language of the Act, they are subject to the pole attachment rate formula set out in section 224(e) of the Act to the same extent as other providers of telecommunication services.

This also is the only reading of the order in this proceeding that is consistent with the portion of the Universal Service Order that the Commission cited here. In that order, the Commission observed that the Act defines "telecommunications" as the transmission of information "without change in the format or content of the information as sent and received." *See* Universal Service Order, ¶ 789, n.2023 (*citing* 47 U.S.C. § 153(43)). As the Commission recognized, an Internet service *content* provider changes the format or content of information through computer processing applications such as interaction with stored data. But the Commission went on to state that when a subscriber obtains a

"connection" to an Internet service provider, "that connection is *a telecommunications service* and is distinguishable from the Internet service provider's [content] service offering." Universal Service Order, ¶ 789 (emphasis added).

That is precisely the point here. When a cable operator provides cable modem service over its cable system, it is providing its subscribers with a transmission service that allows them to access information content services in exactly the same way that transmission services provided by local exchange carriers allow their subscribers to access information content services. Neither the cable company, nor the local exchange carrier, alters the form or content of the communications. That is done by the information service provider. In both cases, the underlying communications service meets the definition of a "telecommunications service" under the Act.

This interpretation also is consistent with the Commission's decision in the Universal Service Order to treat Internet "conduit" services differently from Internet access content services for purposes of providing universal service support to schools and libraries. Universal Service Order, ¶¶ 443-44. The Commission recognized a distinction between basic Internet access conduit service, which is the transmission of information, and access to proprietary content and other information services on the Internet. To the extent that cable companies provide the basic conduit to Internet content providers, they qualify as telecommunications carriers for purposes of applying pole attachment rates.

This interpretation also is consistent with the Commission's recent Report to Congress on universal service. CC Docket No. 96-45, FCC 98-67 (rel. Apr. 10, 1998).

In that report, the Commission made it clear that an entity that provides underlying transmission services to an Internet service provider is a telecommunications carrier. Id. at ¶ 67. Where cable companies provide modem service to unaffiliated Internet service providers, they clearly fall within the definition of providers of telecommunications services.

The same result applies where a cable operator provides the transmission facilities or services for use by its own or affiliated Internet service providers. Under these circumstances, the cable operator is providing the underlying transmission service for use by its end user customers to reach its affiliated Internet service provider and is, therefore, providing a telecommunications service – and qualifies as a telecommunications carrier – under the clear language of the Act. See 47 U.S.C. Sections 153(43), (44), (6).

Moreover, even if the Commission were to conclude otherwise, it should use its authority under Section 224(b)(1), which the Commission has concluded allows it to determine the just and reasonable rate for pole attachments by entities that provide neither cable-only service or telecommunications services, to decide that the Section 224(e) pole attachment rate is reasonable for cable companies that provide transmission facilities to themselves in offering Internet access services. This is similar to the Commission's decision in its report to Congress to reserve judgment on whether even Internet service providers who offer Internet access service using their own transmission facilities, and who the Commission defines as providers of information services, should be required to contribute to universal service mechanisms under the Commission's authority to include other providers of "telecommunications" in the fund. Id. at ¶ 69.

This approach is the only one that is consistent with the pro-competitive policies that underlie the 1996 Act, which was designed to promote a "pro-competitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition." Joint Explanatory Statement at 113. This policy is reflected in the amendments to section 224, which allow cable companies to pay different, generally lower, pole attachment rates than other entities only so long as they use pole attachments "solely to provide cable service." 47 U.S.C. § 224(d)(3). In contrast, when cable companies provide the equivalent of the "local loop" transmission service to connect subscribers to the Internet, they compete directly local exchange companies – both incumbents and new entrants alike. Under these circumstances, allowing cable companies to pay preferential pole attachment rates for services that compete directly with Internet conduit services provided by the local exchange carriers would undermine competition by giving an artificial advantage to one class of competitors. In fact, because the local exchange carriers are often the pole owners, they effectively would be required to subsidize the directly competing Internet conduit services of cable companies by giving them cut-rate pole attachment rates, adding insult to injury. This is precisely the type of anti-competitive result that Congress sought to avoid by requiring all providers of telecommunications services, including cable operators, to pay attachment rates that are calculated based on the formula contained in section 224(e).

Finally, while the Commission adopted a rule requiring cable companies to provide notice to pole owners when they begin offering telecommunications services through pole attachments (*see* 47 C.F.R. § 1.1403(e)), it did not provide any remedy if a

cable company fails to comply with this rule. To avoid embroiling the Commission in complaints regarding failures by cable companies to provide timely notice, the Commission should make it clear that, where cable companies do not provide notice prior to the date that they begin offering telecommunications services through pole attachments, pole owners are entitled to back-bill cable companies, with interest, to the date that the cable companies began offering such services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 1998 a copy of the foregoing "Petition of Bell Atlantic for Clarification or for Reconsideration" was served on the parties on the attached list.

Tracey M. DeVaux

* Via hand delivery.

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